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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 793

LOUISIANA FINANCIAL ASSISTANCE COMMISSION, *et al.*,

Appellants,

—v.—

BRYAN POINDEXTER, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO AFFIRM

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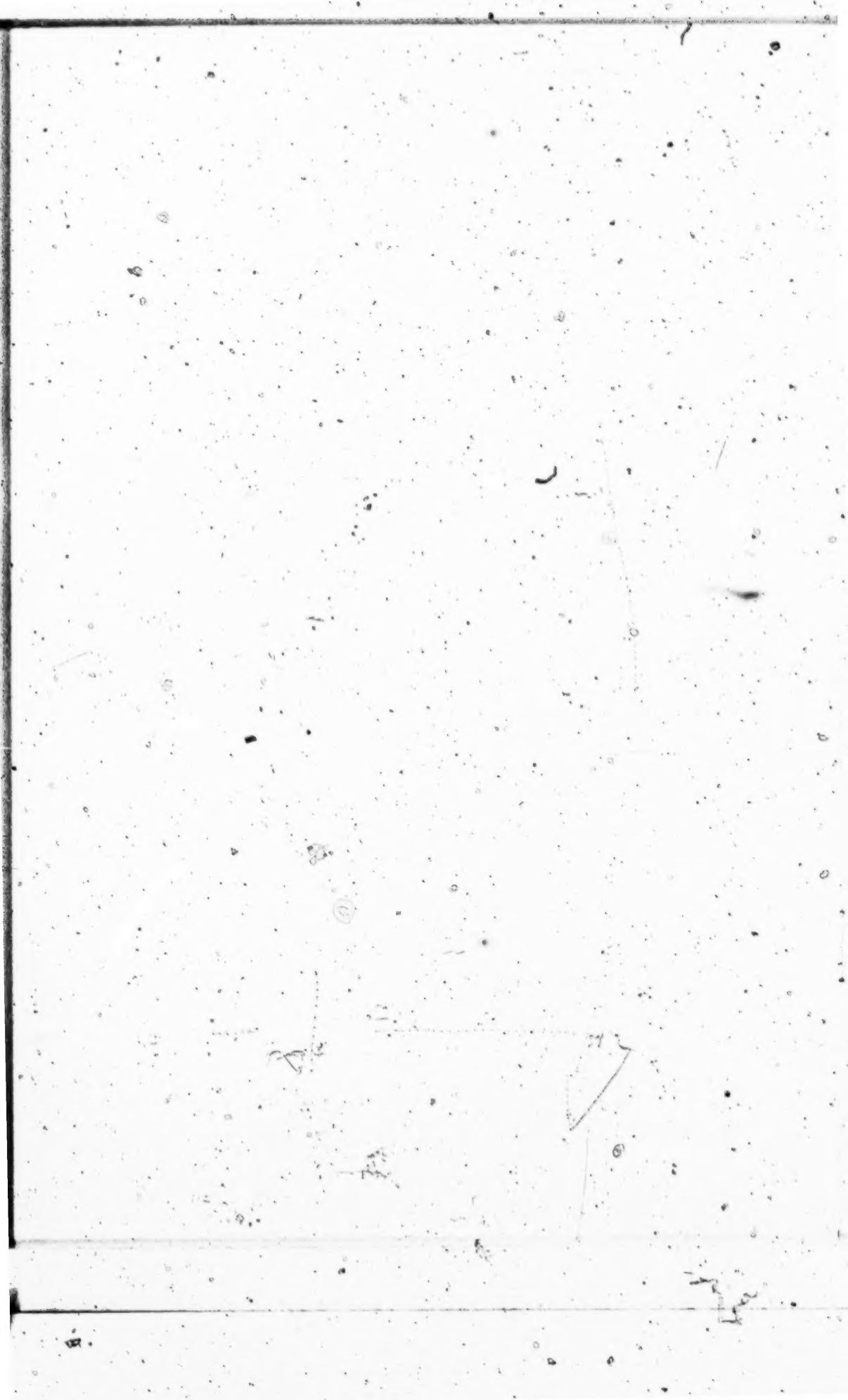

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Appellees Bryan Poindexter, et al., respectfully move the Court, pursuant to Rule 16(1)(c) of the Rules of the Court, to affirm the judgment below and in support thereof would show that plenary consideration of this appeal is unnecessary because the decision below is clearly correct.

Citations to Opinions Below

The judgment below and the opinion supporting it, of August 2, 1967, is not yet reported. The earlier decision of August 3, 1966 is reported at 258 F. Supp. 158 (E.D. La. 1966). (See Jurisdictional Statement, Appendix pp. 1, 17).

Jurisdiction

Jurisdiction of this appeal is founded upon 28 U.S.C. §1253, in that injunctive relief was sought and obtained from a three-judge district court constituted pursuant to 28 U.S.C., §§2281 and 2284 against the enforcement of a statute of the State of Louisiana on the ground that it violates the Constitution of the United States both on its face and as applied.

Question Presented

Did the court below abuse its discretion in enjoining the enforcement of Act 147 of the 1962 Louisiana Legislature after finding that the purpose and effect of that statute was to create and maintain a separate, racially segregated "private" school system with state support?

Statement of the Case

This action was commenced as a class action on June 29, 1964 *challenging* the constitutionality of Act 147[1] of the 1962 Session of the Louisiana Legislature. Plaintiffs were upheld in their contention that the origin and purpose of that statute made it unconstitutional both in itself and in its application because it was designed to create and maintain a separate, racially segregated school system at public expense.[2]

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[1] LSA-R.S. §§17:2951-2959.

[2] Appellants' Statement of the Case, at p. 5, misstates what appellees have asserted in their complaint and at oral argument on the motion to dismiss. They state: "[Appellants] do not ask in their complaint that Act 147 of 1962 be declared unconstitutional and their counsel stated in oral argument that their decision not to do so was deliberate and declined to amend their complaint in this respect when the Court suggested that

Act 147 created the Louisiana Financial Assistance Commission and empowered it to pay out tuition grants to qualified pupils to attend private non-sectarian schools throughout the state. The Act requires that pupils, to qualify, be eligible for admission to public schools. The grant program is to be maintained by sales tax dedications to a fund to be administered by the Commission in amounts up to $300,000 per month (as of the 1963 fiscal session of the Legislature). Grants are payable directly to the pupil or his parent or guardian rather than to the school or jointly.

The Commission and the other defendants filed motions to dismiss in June and July of 1964 contending that since plaintiffs' complaint challenged the use by Louisiana of public funds, plaintiffs lacked standing to challenge Act 147 in federal court.[3] The district court overruled their motions in its opinion and order of August 3, 1966:

> The defendants' motion to dismiss the action for lack of standing rests on their analysis of the com-

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they do so." True, plaintiffs did not explicitly move for a declaratory judgment, but both in their complaint (Complaint, pp. 5, 6) and in the argument (Transcript of Hearing, March 19, 1965, pp. 41-44) it is clear that the asserted premise for injunctive relief was both the facial unconstitutionality of Act 147 and its unconstitutionality as applied. It was clearly argued that plaintiffs considered that the district court could not issue the injunction sought unless it first determined that Act 147 was unconstittuional either or both on its face and in application (id. 44).

[3] Defendants' position in their motions to dismiss, and here, are identical. As here, defendants assert that cases decided by this Court such as *Frothingham* v. *Mellon*, 262 U.S. 447 (*Massachusetts* v. *Mellon*, 262 U.S. 447) foreclose private parties from challenging state functions as remote as the distribution of public benefits made available through tax levies. This view, of course, overlooks the obvious answer that plaintiffs were not challenging the right of the state to distribute money to students to attend private schools, but rather the distribution of money for the purpose of supporting institutions practicing racial segregation. See 258 F.Supp. at p. 162.

> plaint as asserting only a state claim that belongs, if it belongs anywhere, in state courts. . . . In short, so the defendants say, the plaintiffs' suit is nothing more than a taxpayer's suit to enjoin the state's unlawful expenditure of public funds for private purposes. Snowden v. Hughes, 1944, 321 U.S. 1, 6, 64 S.Ct. 397, 88 L.Ed. 497, 501; Dinwiddie v. Brown, 5 Cir. 1956, 230 F.2d 465; Hanna v. Home Insurance Company, 5 Cir. 1960, 281 F.2d 298.
>
> The defendants' argument rests on a misunderstanding of the nature of the plaintiffs' rights. The plaintiffs are not suing as Louisiana taxpayers objecting to the legislature's violation of the State Constitution. They assert federal rights protected by the United States Constitution. (258 F.Supp. at 162)

The trial court also concluded that this case was proper for determination by a three-judge court under 28 U.S.C. §2281 since the petition challenged a statewide policy in its attack upon the constitutionality of the statute (258 F. Supp. at 165).

At trial, March 20 through March 22, 1967, the Court considered massive evidence to determine "the purpose, mechanics, and effect" of Act 147, "[t]he extent to which the tuition grants contributed to the founding of the quasi-public schools, in dollars as a stimulus, the extent to which the grants . ... contribute to the support of the quasi-public schools, the extent of state involvement and control, and other factors relevant to state action . . ." (258 F. Supp. at 164, 165).

Legislative purpose was determined by examining the historical context in which the statute was enacted. The Court started with the earliest efforts of Louisiana to

create and maintain segregated schooling, then focused on the Legislature's elaborate more recent attempts to thwart this Court's mandate in *Brown v. Board of Education*, 347 U.S. 483 (1954).[4]

After examining the context of the statute and the statements of persons responsible for its introduction and passage, as well as its design, the Court concluded that present Act 147 did not depart significantly from its predecessor, Act 3, declared unconstitutional in *Hall* v. *St. Helena Parish, supra.* (J. S. App., p. 31). Borrowing a phrase from the opinion in *Lee* v. *Macon County School Board*, 267 F. Supp. 458, 477 (M.D. Ala. 1967 aff'd sub nom.

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[4] Most of these devices of evasion are reflected in litigation in this same district court. In 1954, Article XII, §1, of the 1921 Constitution was amended to require separate public schools for white and Negro children. Acts 555 and 556 implemented this constitutional requirement and were stricken in February 1956 in *Bush* v. *Orleans Parish School Board*, 138 F.Supp. 337 (E.D. La. 1956), aff'd. 242 F.2d 156, cert. denied 354 U.S. 921. In 1956 Act 319 was passed to freeze the existing racial status of public schools in Orleans Parish and gave the Legislature the power of racial re-classification. This was declared unconstitutional in *Bush*, 163 F.Supp. 701, aff'd. 268 F.2d 78. In 1958, Acts 257 and 258 provided for the establishment of educational cooperatives and Louisiana's first grant-in-aid system for "children attending non-sectarian, non-public schools." In 1960 the Louisiana Legislature authorized the Governor to close integrated schools or any public schools faced with the threat of riots or disorder and the Attorney General of Louisiana obtained an injunction restraining the Orleans Parish School Board from desegregating its schools. Later, the Governor took over control of the Orleans Parish Public Schools and in August of 1960 a three-judge district court invalidated these actions and the underlying statutes in *Bush*, 187 F.Supp. 42, aff'd. 365 U.S. 569. In five extraordinary sessions of the Legislature, laws were passed authorizing the Legislature to seize all funds of the Orleans Parish School Board, prevent banks from loaning money to the Board, and to take over control of the Board generally. These actions were declared unconstitutional in *Bush*, 188 F.Supp. 916, aff'd. 365 U.S. 569; *Id.* 191 F.Supp. 871, aff'd. 367 U.S. 907; *Id.* 194 F. Supp. 182, aff'd. 367 U.S 907, 368 U.S. 11. Finally, Act 3 of the Second Extraordinary Session of 1960, the Legislatures' second version of grants-in-aid, was declared unconstitutional in *Hall* v. *St. Helena Parish School Board*, 197 F.Supp. 649 (E.D. La. 1961), aff'd. per curiam, 360 U.S. 515.

Wallace v. *United States,* No. 489, 36 U.S. L. Week 3225 (U.S. Dec. 5, 1967), the Court stated that the present tuition statute was "designed to fill the vacuum of [the] court's injunction against the [earlier] tuition statute.":

> Thus, for a hundred years, the Louisiana legislature has not deviated from its objective of maintaining segregated schools for white children. Ten years after *Brown,* declared policy became undeclared policy. Open legislative defiance of desegregation orders shifted to subtle forms of circumvention—although some prominent sponsors of grant-in-aid legislation have been less than subtle in their public expression. But the changes in means reflect no change in legislative ends.

Turning to the effects of the statute, the Court found from a thoroughly developed record that "tuition grants have supplied a heavy predominance of funds needed to establish and maintain post-1954 and especially post-1962 private segregated schools." (J. S. App. pp. 34, 35, 45). The Commission contended that a resolution adopted by it to limit grants to schools not "predominantly maintained" by the grants saved its constitutionality within the test used by the three-judge court in *Griffin* v. *State Board of Education,* 239 F. Supp. 560 (E.D. Va., not appealed), and the definitions of a "public school" contained in Title IV of the Civil Rights Act of 1964. The Court rejected this contention on the ground that the question of involvement turned on whether the state was "significantly" involved, the test adopted by this Court in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 and that "[o]nly by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true signifiance." 365 U.S. at 723 (J. S. App., p. 34).

Notice of Appeal was filed in the district court on September 8, 1967. Appellants moved Mr. Justice Black for a stay of the injunction, but it was denied on September 2, 1967.

ARGUMENT

The District Court Was Clearly Correct in Concluding That Act 147 Violates the Fourteenth Amendment to the United States Constitution.

The tack of the lower court's opinion, in determining the constitutionality of Act 147 through an examination of its purpose and effect, is faithful to the course of decisions by this Court. It is quite appropriate to consider the historical context of a statute as part of the relevant circumstances surrounding its enactment. See, e.g., *Grosjean* v. *American Press Co.*, 297 U.S. 233; *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218, 231; *Louisiana* v. *United States*, 380 U.S. 145. An examination of the context, unlike a search for the motives of legislators, may reveal that a particular enactment is really part of a scheme or systematic development to preserve segregated schooling. The record here buttresses the Court's conclusion that Act 147 is no more than a more sophisticated substitute for the earlier tuition grant statute invalidated in *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, aff'd per curiam, 368 U.S. 515.

A parallel course was taken by the district court in Alabama whose judgment was recently approved by this Court, *Lee* v. *Macon County Bd. of Education*, 267 F. Supp. 458 (M.D. Ala. 1967), aff'd sub nom. *Wallace* v. *United States*, No. 489, 36 U.S. L. Week 3225 (U.S. Dec. 5, 1967):

> Alabama's present tuition statute must be analyzed in the historical context which gave rise to its enact-

> ment. It is unmistakably clear that the concept of tuition grants to students wishing to attend private schools in Alabama was born of an effort to resist and frustrate implementation of the *Brown* decision. (267 F. Supp. at 476).

Whatever the merits of the "predominant support" standard of *Griffin* v. *State Board of Education*, 239 F. Supp. 560 (E.D. Va.), the origin and effect of Act 147 work to distinguish it from the Virginia case. Correctly, the court below concluded that unlike Virginia the purpose of Louisiana's tuition grant program was not just to "encourage and not just to authorize private racial discrimination in the field of education. The purpose was to *establish and maintain* 'private' segregated schools." (emphasis added) (J. S. App. p. 54). State action is present in the making of the grants, and "[t]here is no such thing as the State's being just a little bit discriminatory." (J. S. App. p. 20).

It may be appropriate to employ the "predominant support" standard of *Griffin* and Title IV of the 1964 Civil Rights Act to determine what kind of institutions are "public" for purposes of desegregating them, but certainly the district court was correct in concluding that the state cannot supply any significant amount of support to an institution practicing racial segregation. Thus, the court below was clearly correct in determining that Louisiana could not use any statutory scheme to lend support to the establishment and maintenance of racially segregated educational institutions.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

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